Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Tariq Ahmed Siddiqui,

applicant,

and

Canadian Merchant Service Guild,

respondent.

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June 10, 2014

Parties' Representatives of Record

Mr. Tariq Ahmed Siddiqui, on his own behalf;

Ms. Kimberley H. W. Turner, Q.C., for the Canadian Merchant Service Guild.

[1] On February 28, 2014, the Canada Industrial Relations Board (the Board) issued a decision, *Siddiqui*, 2014 CIRB 715 (*RD 715*), in which it dismissed an unfair labour practice (ULP) complaint filed against the Canadian Merchant Service Guild (the CMSG or the union) by Mr. Tariq Ahmed Siddiqui (the applicant). On March 28, 2014, the applicant filed a timely application for reconsideration of this decision pursuant to section 18 of the *Canada Labour Code* (*Part I – Industrial Relations*) (the *Code*).

[2] A reconsideration panel of the Board, composed of Ms. Elizabeth MacPherson, Chairperson, and Ms. Louise Fecteau and Mr. Patric F. Whyte, Vice-Chairpersons, has considered the parties' respective submissions and has determined that the reconsideration application should be granted and the original ULP complaint referred to a differently constituted panel of the Board for a hearing *de novo*. These are the reasons for that decision.

I. Background

[3] The events that led to the filing of the applicant's ULP complaint were set out in *RD 715* and can be briefly summarized here as follows:

- the applicant is a 53-year old marine engineer;
- the applicant had applied for membership in the CMSG, which is the trade union certified by the Board to represent marine engineers working for various employers throughout Canada, including those working for Desgagnés Marine Cargo Inc. (Desgagnés or the employer);
- in November 2011, the applicant accepted a position with Desgagnés, despite the fact that the CMSG was engaged in a lawful strike against that employer at the time;
- the CMSG informed the applicant that it considered him to be a scab and could bar him from working under any CMSG contract in the future;
- after receiving this advice, the complainant left his position at Desgagnés;
- in August 2012 and again in February 2013, the CMSG refused to admit the applicant to membership; this refusal meant that the applicant could not work on any ships subject to a CMSG collective agreement, including those belonging to Desgagnés;
- on August 16, 2013, the applicant filed a complaint against the CMSG pursuant to sections 95(*f*) and (*g*) of the *Code*.

II. *RD 715*

[4] In *RD 715*, the Board dismissed the applicant's ULP complaint on the grounds that he was not an employee within the meaning of the *Code*, and therefore was not entitled to file a complaint pursuant to section 95(*f*) or (*g*) of the *Code*, which read as follows:

> 95. No trade union or person acting on behalf of a trade union shall
>
> ...
>
> (*f*) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union;
>
> (*g*) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union.

III. Positions of the Parties

A. The Applicant

[5] The applicant submits that the Board committed a breach of procedural fairness or natural justice when it decided his ULP complaint on a preliminary issue that had not been contested by the union and did not provide him with an opportunity to make submissions regarding this issue. The applicant maintains that it is a breach of natural justice for an administrative tribunal to decide a case on a point on which a litigant has had no notice and no opportunity to present argument.

B. The Union

[6] The CMSG submits that the applicant has failed to establish the exceptional circumstances necessary to support an application for reconsideration of a decision of the Board. It also argues that the Board did not breach natural justice, and was correct in finding that the applicant was not an employee and therefore was not entitled to make a complaint to the Board under sections 95(*f*) and/or (*g*) of the *Code*. It argues that the Board does not have a proactive obligation to advise parties of deficiencies in their evidentiary pleadings so as to bring themselves within the scope of the Board's jurisdiction. The union suggests that nothing turns on the CMSG's failure to raise the applicant's status as a bar to his ULP complaint and that the onus is on a complainant to establish that he has the requisite status to pursue a complaint under the *Code*. It argues that the applicant's failure to plead evidence to support a claim that he was an employee does not provide grounds for a claim that the Board breached the principles of natural justice.

IV. Analysis and Decision

[7] The Board's approach to applications for reconsideration was most recently set out in *Buckmire*, 2013 CIRB 700:

> **A. Review vs. Reconsideration**
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> [16] Section 18 of the *Code* establishes the Board's review power:
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> > 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[17] The reconsideration of recent decisions is just one component of the Board's review power. For example, the review power has been used in the past to revoke a certification which a trade union had abandoned: *PCL Constructors Northern Inc.*, 2006 CIRB 345.

[18] Similarly, the review power allows the Board to retain jurisdiction over the description of the bargaining units it certifies. The Board can then determine whether new positions fall within an existing unit or if the trade union has double majority support in order to expand the scope of its current bargaining unit: *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503.

[19] This Board's predecessor, the Canada Labour Relations Board (CLRB), formerly used the *Code*'s review power to merge an employer's multiple bargaining units. This bargaining unit review process has now been codified in section 18.1 of the *Code*.

[20] The Board may also exercise its review power if legitimate questions arise whether a party still falls within federal jurisdiction, for example, following a constitutional decision from the Supreme Court of Canada (SCC): *Treaty Three Police Service*, 2013 CIRB 677 (*Treaty Three 677*) at paragraphs 15–16.

[21] That type of application concerning the Board's jurisdiction is not a reconsideration of a recent decision, but is rather a request to review the Board's continuing authority over one or more parties. The time limits designed for the Board's reconsideration of recent decisions do not apply to that type of review: *Dilico Anishinabek Family Care*, 2012 CIRB 655 at paragraphs 26–27 and 35–38.

[22] The Board's reconsideration process for recently issued decisions has existed for decades, with some small modifications occurring over time. The Board has always exercised its power to reconsider with restraint and for exceptional situations only, given the importance of the principle of finality as set out in the *Code*'s privative clause at section 22. See also, *Kies*, 2008 CIRB 413 (*Kies 413*) at paragraphs 4–9.

B. CLRB Reconsideration

[23] In the 1970s, the CLRB developed the main, though not exhaustive, grounds for reconsideration applications.

[24] In *Canadian National Railways* (1975), 9 di 20; [1975] 1 Can LRBR 327; and 75 CLLC 16,158 (CLRB no. 41), the Board described how a party could bring new facts to the attention of the Board, if those facts would have caused the panel to arrive at a different conclusion. The new facts had to be those which the applicant could not have brought before the original panel. A failure to plead a case fully could not support a request for reconsideration.

[25] Similarly, an erroneous interpretation of the *Code* or a board policy constituted a second ground for reconsideration: *British Columbia Telephone Company* (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,008 (CLRB no. 220).

[26] In *Cablevision Nationale Ltd.* (1978), 25 di 422; and [1979] 3 Can LRBR 267 (CLRB no. 135), the Board noted that another ground for reconsideration could arise from a failure by the original panel to respect a principle of natural justice.

[27] The CLRB also developed a 21-day time limit for the filing of reconsideration applications. This time limit was later codified in section 37(2) of the *Canada Labour Relations Board Regulations, 1992*:

> 37 (2) An application under section 18 of the Act to reconsider a decision or order that is alleged to be erroneous in law or contrary to the policies of the Board shall be filed within 21 days after the date the decision or order being contested was made.

[28] The CLRB used "summit" (later renamed "reconsideration") panels, composed of either three Vice-Chairs or the Chair and two Vice-Chairs, to screen reconsideration applications. The role of these panels was either to dismiss the application or to send it to a plenary meeting of the Board: *Brewster Transport Company Limited* (1986), 66 di 133; and 86 CLLC 16,045 (CLRB no. 580).

C. Codification

[29] On December 5, 2001, the Board included section 44 in the *Canada Industrial Relations Board Regulations, 2001* (*2001 Regulations*) to describe the main, though not exhaustive, grounds for reconsideration:

> 44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:
>
> (*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
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> (*b*) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
>
> (*c*) a failure of the Board to respect a principle of natural justice; and
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> (*d*) a decision made by a Registrar under section 3.

[30] Section 44 of the *2001 Regulations* codified the Board's three main grounds for reconsideration: *TV Ontario*, 2001 CTRB 152 at paragraph 14. It also referenced the Registrar's power under section 3 of the *Regulations* to make binding decisions on specific consent applications.

[31] The CTRB did not continue using the plenary process the CLRB had followed: *Telus Communications Inc.* v. *Telecommunications Workers Union*, 2005 FCA 262. Instead, in relatively rare circumstances, the reconsideration panel itself could overturn the original panel's decision.

D. Current Practice

[32] On December 18, 2012, section 44 of the *Regulations* was repealed, based on the recommendation of the Standing Joint Committee for the Scrutiny of Regulations (Committee). The reasons for the Committee's request to revoke section 44 were described in *Treaty Three 677*, *supra*, at paragraph 11:

> [11] In 2002, the Standing Joint Committee for the Scrutiny of Regulations (the Committee) questioned the purpose of section 44 of the *2001 Regulations*. In particular, the Committee was concerned that this regulatory provision could fetter the broad discretion given to the Board under section 18 of the *Code*. Ultimately, the Board agreed with the Committee and section 44 was revoked in 2012 with the coming into force of the *2012 Regulations*. While the Board retains the power to reconsider any of its decisions or orders, the grounds for such applications are clearly not limited to those contained in the former section 44. At the same time, the Board extended the time

period in which a reconsideration application can be made to 30 days, to be consistent with the time limit for the filing of a judicial review application under the *Federal Courts Act*

[33] As noted in *Treaty Three 677*, *supra*, the previous 21-day time limit for reconsideration applications in section 45 of the *Regulations* was increased to 30 days to coincide with the time limit parties have to judicially review a Board decision.

[34] The Federal Court of Appeal has reminded parties in numerous decisions that an application for reconsideration does not interrupt the time limit for judicial review of the Board's original decision. Judicial review of only the reconsideration decision will not result in the Court judicially reviewing the Board's original decision: *Remstar Corporation* v. *Syndicat des employé-es de TQS Inc. (FNC-CSN)*, 2011 FCA 183, leave to appeal to SCC refused *Remstar Corporation* v. *Syndicat des employés-es de TQS Inc. (FNC CSN) et al.*, [2011] S.C.C.A. No. 377. The Court consistently takes the view that an application for judicial review must be made for each distinct Board decision.

[35] The deletion of section 44 has not changed the Board's longstanding practice for reconsideration applications. That practice was summarized, albeit in reference to section 44, in *Kies 413*, *supra*.

[36] The main grounds for reconsideration, and the applicant's obligations when pleading an application for reconsideration, remain as described below. Decisions of the Registrar under section 3 of the *Regulations* similarly remain subject to reconsideration.

1. New Facts

[37] This ground involves new facts which the applicant did not put before the Board when originally pleading its case. It is not an opportunity for the applicant to add facts it had omitted to plead.

[38] As summarized in *Kies 413*, *supra*, an application for reconsideration will include, at a minimum, the following information about the alleged new facts:

1. What the new facts are;
2. Why the applicant could not have put them before the Board panel originally; and
3. How those new facts would have changed the Board's decision under review.

[39] Generally, the original panel will consider applications raising this ground, given its advantageous position to decide whether "new facts" exist and their impact, if any, on its previous decision.

2. Error of Law or Policy

[40] Any alleged error of law or policy must cast serious doubt on the Board's interpretation of the *Code*. This creates a two-pronged test. A mere difference of opinion about the legal or policy interpretation will not justify reconsideration.

[41] A party must also have raised the point of law or policy issue in question before the original panel.

[42] The minimum pleading requirements for an allegation raising an error of law or policy remain as set out in *Kies 413*, *supra*:

1. A description of the law or policy in issue;
2. The precise error the original panel made in applying that law or policy; and

3. How that alleged error cast serious doubt on the original panel's interpretation of the *Code* or policy.

3. Natural Justice and Procedural Fairness

[43] Reconsideration may raise allegations that the original panel failed to respect the principles of natural justice or those related to procedural fairness.

[44] As described in *Kies 413*, *supra*, a party's minimum pleading requirements would address the following issues:

1. An identification of the particular principle of natural justice or procedural fairness in issue; and
2. A description of how the original panel allegedly failed to respect that principle.

E. Summary of Main Grounds for Reconsideration

[45] In summary, the main grounds for reconsideration may be described as follows:

(*a*) New facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;

(*b*) Any error of law or policy that casts serious doubt on the interpretation of the *Code* or policy;

(*c*) A failure of the Board to respect a principle of natural justice or procedural fairness; and

(*d*) A decision made by a Registrar under section 3 of the *Regulations*.

[8] In the instant case, the applicant alleges a failure of the Board to respect a principle of natural justice or procedural fairness. The Board notes that the applicant was self-represented in the Board's original proceeding. While self-representation does not relieve a party from compliance with the Board's regulations and rules of procedure, it is incumbent on the Board to take into consideration the capacity of individuals appearing before it without legal representation.

[9] The applicant sincerely believed that he was an employee when he filed his ULP complaint with the Board, and therefore had no cause to think that he needed to file evidence with respect to his standing to make the complaint. He was not given notice of the fact that the Board had any concerns regarding his standing. This is particularly significant, given that the applicant's standing to make the complaint was not raised by the respondent CMSG, but by the Board on its own motion. Consequently, the applicant did not have an opportunity to provide submissions regarding this issue.

[10] The reconsideration panel is of the view that, at a minimum, the applicant should have been given notice that the Board had concerns regarding his standing to make the ULP complaint, and an opportunity to make representations as to his status.

[11] Accordingly, the Board finds that, by proceeding as it did, the Board breached the principles of procedural fairness. As a consequence, *RD 715* is hereby struck down. The applicant's original ULP complaint will be reopened and remitted to a differently constituted panel to hear *de novo*.

[12] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Louise Fecteau
Vice-Chairperson

Patric F. Whyte
Vice-Chairperson